

No. 18,629

IN THE

United States Court of Appeals
For the Ninth Circuit

DYMO INDUSTRIES, INC.,	}
<i>Plaintiff-Appellant,</i>	
VS.	
TAPEPRINTER, INC.,	
<i>Defendant-Appellee.</i>	

PLAINTIFF-APPELLANT'S REPLY BRIEF

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Appellant discusses the points which are raised in the Brief for Appellee in the order of their importance to the issues under review.

A

The most important defensive issue questions the power of this Court to review the determinations of the court below. Appellee states, "Such finding of fact may not be disturbed on appeal." (Brief for Appellee, p. 11). But it fails to point up any "finding of fact" to support the argument. Appellee relies (Brief for Appellee, p. 11) upon the determination of the District Court "that there is great doubt as to whether or not the plaintiff has the exclusive right to use the word 'TAPEWRITER'." (R. 155). This is not a finding which resolves disputed facts, but is essentially one dealing with the effect of the transactions and events presented in the moving and opposition affidavits, to wit, the asserted third party uses and registrations. The true rule on appeal is, appellant submits, stated in *Stevenot v. Norberg* (9 Cir. 1954), 210 F. 2d 615 at 619:

" * * * When a finding is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings shall not be set aside, unless clearly erroneous, but is free to draw its own conclusions. * * * " (Footnotes omitted)

The language to the apparent contrary that "essentially, the question is one of fact" (Brief for Appellee, p. 11), was not a holding of this Court in

Miles Laboratories, Inc. v. Frolich (9th Cir. 1961), 296 F. 2d 740, as appellee implies but was taken instead from *Miles Laboratories, Inc. v. Frolich* (S.D. Cal. 1961), 195 F. Supp. 256 at page 258. This statement should not be deemed controlling in view of this Court's later decision in *Fleischmann Distilling Corp. v. Maier Brewing Company* (9 Cir. 1963), 314 F. 2d 149 at 152:

“Numerous cases in this and other circuits hold that under the circumstances here present, the question of the likelihood of confusion is one for us to decide. In *Sleeper Lounge Company v. Bell Manufacturing Co.*, 9 Cir., 253 F. 2d 720, 723, this court quoted with approval the quotation in *Miles Shoes, Inc. v. R. H. Macy & Co.*, 2 Cir. 199 F. 2d 602, that ‘we are in as good a position as the trial judge to determine the probability of confusion.’

“One reason for applying the rule of that case and of the other cases in accord cited in the margin is that this determination of likelihood of confusion partakes more of the character of a conclusion of law than of a finding of fact. The inference to be drawn from the undisputed facts here are ‘derived from application of a legal standard.’ *Lundgren v. Freeman*, 9 Cir., 307 F. 2d 104, 115. Appellant asserts that this function of determining the likelihood of confusion is for us, and this has not been challenged by the appellees.” (Footnotes omitted)

This Court has also reversed the denial of a final injunction after full proof where the District Court has “applied an improper theory of law,” as in *Audio*

Fidelity, Inc. v. High Fidelity Recordings, Inc. (9 Cir. 1960), 283 F. 2d 551 at page 558. On this point it is significant, that appellee has not distinguished the authorities set forth at pages 7-10 of Plaintiff-Appellant's Opening Brief.

B

The next most important point is the effect of appellant's registration. This Court, in the recent case of *Pacific Supply Cooperative v. Farmers Union Central Exchange Incorporated et al.* (9 Cir. 1963), F. 2d 17, 967, after stating the prior rule upon which appellee relies (Brief for Appellee, p. 14) and the changes made by the 1905 Act, stated the effect of the Lanham Act at pp. 20-21 of the slip opinion:

“* * * in 1947 the Lanham Trade Mark Act became effective, after its adoption the previous year. Its purpose was not only to clear up inconsistencies and alleged ‘constructions’ of prior acts which ‘obscured and perverted’ their original purpose, but to simplify practices, carry out international commitments, and to create new substantive rights in registration, and thus create an incentive to registration.

* * * * * *

“For the first time registration of a mark gave *constructive notice to the world* of the registrant's claim of ownership (15 U.S.C. § 1072), including those previously relying on an intrastate use only. Not only did the registration establish prima facie evidence of ownership, but likewise prima facie evidence of validity of the registration and of the registrant's exclusive right to use. * * *” (Footnotes omitted).

The “prima facie evidence” provided by U.S. Code Title 15, §§ 1057(b), 1115(a), places the burden of proof on the appellee. In *Aluminum Fab. Co. of Pittsburgh v. Season-All W. Corp.* (2 Cir. 1958), 259 F.2d 314, the Court held, page 316:

“In the Lanham Act Congress made it clear that weight should be accorded to the actions of the Patent Office. The Act provided that ‘A certificate of registration of a mark * * * shall be prima facie evidence of the validity of the registration * * *.’ 15 U.S.C.A. § 1057(b). We are of the opinion that this means not only that the burden of going forward is upon the contestant of the registration but that there is a strong presumption of validity so that the party claiming invalidity has the burden of proof and in order to prevail it must put something more into the scales than the registrant. * * *

“One of the purposes of the Lanham Act was to encourage registration of trademarks and other marks. Thus, among other things, that Act goes beyond all prior legislation in this field by providing, for the first time, that registration is prima facie evidence of validity.”

The real question on appeal arises as to whether the defenses upon which appellee relies are sufficient as a matter of law to overturn the statutory presumption.

C

In its spearpoint on the merits, appellee has spared no effort. Appellee has combed the files of the Patent Office and has introduced several hundred trademarks (R. 90, 91, R. 115-132), for the most part to prove that the words “tape” and “write” and variations

thereof have been used by others in forming trade-marks. If appellee had expended but a small proportion of that same effort in examining the files of the Patent Office to adopt an original mark *before* adopting a mark so close to that adopted and registered by appellant, the necessity for this trademark suit could have been obviated.

Appellee's primary reliance is placed on the trade-marks set out in Exhibit A (R. 90, 91) of the affidavit of Benedict Bogeaus. None of the Patent Office registrations cited in this exhibit is for "Embossing Machines for embossing plastics, metals, and the like." (Specification of goods from appellant's registration. R. 90). The first and fourth registrations listed were both cancelled prior to the time appellant adopted its mark. The last Patent Office registration was adopted *after* appellant adopted its mark. The remaining registrations also cover diverse goods such as fountain pens, dental instruments, beverage dispensing parts and piece goods.

Since none of these registrations was ever used on the same goods as those of appellant, it follows as a matter of law that they do not in any way impeach appellant's ownership of its mark nor its exclusive right to use the mark on embossing machines. As this Court said in *Sunbeam Lighting Co. v. Sunbeam Corporation* (9 Cir. 1950), 183 F. 2d 969, at 972:

"* * * The mere fact that one person has adopted and used a trade-mark on his goods does not prevent the adoption and use of the same or a similar trade-mark by others on articles of a different description.'"

The third party defense has been tried time and time again in this circuit and has been found wanting in *Fleischmann Distilling Corp. v. Maier Brewing Company* (9 Cir. 1963), 314 F. 2d 149; *National Van Lines v. Dean* (9 Cir. 1956), 237 F. 2d 688; *National Lead Company v. Wolfe* (9 Cir. 1955), 223 F. 2d 195; and *Del Monte Special Food Co. v. California Packing Corporation* (9 Cir. 1929), 34 F. 2d 774.

Appellee argues that neither *Fleischmann* nor *National Lead* involves a preliminary injunction (Brief for Appellee, pp. 64-65). Appellant submits that this distinction serves to strengthen, rather than to weaken, the authority of these two cases. In both *Fleischmann* and *National Lead*, the defendant was given an ample opportunity to prove up third party usages much more pertinent than those upon which defendant here relies. In each case, the proven fact of third party usages was considered by the trial court as justifying the conduct of the defendant. This Court, however, ruled that such facts, even if proved, did not justify an infringement of the plaintiff's mark and, in each case, reversed the trial court. Appellant submits, therefore, that the logical rule to be derived from these two cases is that they demonstrate that a trial on the merits of the defenses upon which the District Court here relied could avail the defendant nothing.

The Supreme Court authority which appellee cites does not detract from this well developed Ninth Circuit rule.

In *Ubeda v. Zialcita* (1913), 226 U. S. 452 (cited pages 16-17), the evidence conclusively established that

plaintiff had intentionally imitated a much earlier and widely known trademark for the identical goods which both plaintiff and defendant later manufactured. In other words, plaintiff had unclean hands in the true sense of that maxim. This case would be germane if the defendant here had shown that anyone had used the trademark here in question on tape embossing machines at the time plaintiff adopted its mark and that plaintiff had intentionally imitated that mark. Even with the myriad of alleged prior usages upon which appellee here relies, no pretense is made that such a situation is here existent.

In *Goodyear Co. v. Goodyear Rubber Co.* (1888), 128 U. S. 598 (cited pages 21-22), the court pointed out at page 602:

“* * * But the name of ‘Goodyear Rubber Company’ is not one capable of exclusive appropriation. ‘Goodyear Rubber’ are terms descriptive of well-known classes of goods produced by the process known as Goodyear’s invention. Names which are thus descriptive of a class of goods cannot be exclusively appropriated by any one. * * *”

In the case at bar on the other hand, the class of goods involved is known as tape embossing machines. The word “TAPEWRITER” and its synonym “TAPE-PRINTER” taken by themselves do not describe a tape embossing machine. Used by itself, neither name describes any known article. Neither word appears in the most complete dictionary. At most, the marks are suggestive, but then only after one has seen them used in connection with the specific articles.

The remaining cases on the third party defense either antedate The Lanham Act or are from remote jurisdictions. We submit that the rule applied in this circuit enunciates the principles applied in The Lanham Act more soundly than do any of the authorities upon which appellee relies. This circuit is not alone in its appraisal of the law. For example, the contention that because of prior use of the identical mark by a third party, the registrant did not have exclusive rights in the mark and could not enjoin its use was considered and overruled in *Aluminum Fab. Co. of Pittsburgh v. Season-All W. Corp.* (2d Cir. 1958), 259 F. 2d 314, with recognition of *Ubeda v. Zialcita* (1913), 226 U. S. 452 (259 F. 2d at page 317).

D

Appellee also attacks appellant's trademark on the ground that it is descriptive, but as we have pointed out two paragraphs above the goods are described as tape embossing machines. In addition, the experts in the Patent Office have already decided this question in favor of the mark. Appellee, in adopting its own trademark "TAPEPRINTER" proclaimed it to be a trademark (R. 17, 19).

The argument of an appellee who refers to "appellee's mark, 'TapePrinter'" and "appellant's purported trademark, 'TAPEWRITER'" (Brief for Appellee, p. 1), that one mark is a trademark and that the other is descriptive should not be given undue weight. We submit that appellee's admissions as to

trademark significance are a truer test than its strained arguments made solely for the benefit of securing a favorable decision in litigation.

The presumption of validity provided by the statute extends to descriptiveness. This is brought out in *Aluminum Fab. Co. of Pittsburgh v. Season-All W. Corp.* (2 Cir. 1958), 259 F. 2d 314, where the court held:

“* * * In a case such as this, where it can be argued with equal force that a mark is descriptive and on the contrary that it is arbitrary and fanciful, the courts should not overrule the action of the Patent Office to whose care Congress has entrusted the preliminary determination as to whether a mark fulfills the requirements of the statute.” (p. 316)

* * * * *

“The law reports are full of cases which counsel can cite on both sides of the question of whether a trademark is descriptive within the meaning of the Act. See cases cited in 87 C.J.S. Trade-Marks, Etc. § 33, pp. 267-272, and particularly *Gold Seal Company v. Weeks*, D.C. 1955, 129 F. Supp. 928, 929, 934, affirmed *sub nom.* *S. C. Johnson & Sons Inc., v. Gold Seal Co.*, 1956, 97 U.S. App. D.C. 282, 230 F. 2d 832. It may well be that the many differing and irreconcilable views of the courts was one of the reasons which impelled Congress to write into the 1946 Act the presumption of validity from registration. At any rate nothing could be clearer than the fact that prior decisions were of little help, and that there was a need to give to the imprimatur of the Patent Office some real value.” (p. 317)

E

Appellee further urges that there is no confusing similarity between "TAPEWRITER" and "TAPE-PRINTER". When the applicable legal criteria set forth in Restatement of the Law, Torts, vol. 3, § 729, pp. 592-593, are applied to the marks in question, it is plain that appellee's trademark "TAPE-PRINTER" is confusingly similar to appellant's registered trademark "TAPEWRITER."

It is undeniable that the meaning of the two marks is substantially identical in that each suggests the placing of indicia on tape in a fanciful manner which is not actually practiced by either party. Whereas both emboss neither so states.

The appearance of the two marks are almost identical. Both begin with the word "Tape" and both end with the identical syllable "ter." Both marks have an "ri" letter combination in the middle of the mark. Indeed, all that need be done to convert appellee's trademark to that of the appellant is to change the letter "p" to the letter "w" and to drop the letter "n".

And the same situation is presented with respect to the sounds of the two trademarks. Both marks are accented on the first syllable and this syllable is identical in both. In addition, the next most prominent syllable, namely the last syllable, is again identical. If the two marks are said aloud, they can be distinguished only with close attention.

Under the circumstances, the similarities between the two marks are much more pronounced than were

the similarities between the two marks involved in *G. D. Searle & Co. v. Chas. Pfizer & Co.* (7 Cir. 1959), 265 F. 2d 385, wherein the Court of Appeals, in reversing the District Court, found that the trademark “Bonamine” was confusingly similar to “Dramamine.” At page 387, the court said:

“That part of the finding which states Dramamine and Bonamine are unlike is clearly erroneous. Dramamine and Bonamine contain the same number of syllables; they have the same stress pattern, with primary accent on the first syllable and secondary accent on the third; the last two syllables of Dramamine and Bonamine are identical. The initial sounds of Dramamine and Bonamine (‘d’ and ‘b’) are both what are known as ‘voiced plosives’ and are acoustically similar; the consonants ‘m’ and ‘n’ are nasal sounds and are acoustically similar. The only dissimilar sound in the two trademarks is the ‘r’ in Dramamine. Slight differences in the sound of similar trademarks will not protect the infringer. *Lambert Pharmacal Co. v. Bolton Chemical Corp.*, 2 Cir., 219 F. 325, 326.”

Concurrent use of appellant’s mark “TAPEWRITER” and the appellee’s mark “TAPEPRINTER” on identical goods moving through the same channels of trade and the same retail outlets can do nothing but create confusion in the minds of the purchasing public.

F

Appellee contends that appellant’s use of the mark “DYMO” with its mark “TAPEWRITER” prevents

the latter mark from serving as a source of origin (Brief for Appellee, pp. 25-28). The argument lacks substance. It is like arguing that Ford cannot protect Falcon because sometimes Ford advertises the Ford Falcon.

The argument lacks factual substance. This contention is based on a truncated view of the record. Reference to typical examples of appellant's advertising in the record shows that the mark "TAPEWRITER" is frequently used alone and is consistently given as much prominence as the mark "DYMO," when the marks are used together. Thus in Exhibit A attached to the Complaint (R. 11), "TAPEWRITER" appears alone just above the upper illustration of the device and is followed by the trademark registered symbol ®. In Exhibit B attached to the Complaint (R. 12), the mark is used alone in the text, the mark being printed in conspicuously larger type than that used for the text and with an asterisk behind it to indicate that it is a trademark of Dymo Industries, Inc. The legend "*TRADEMARK DYMO INDUSTRIES INC." appears just above the top illustration. Whenever the mark "TAPEWRITER" is used in this exhibit with other trademarks of the appellant it is given equal prominence. Again in Exhibit C attached to the Complaint (R. 13), the mark is given the same prominence as the mark "DYMO" and is followed with the trademark registered symbol ®. In Exhibit D (R. 14), the mark is used alone in the "A MESSAGE FROM THE MAKERS" text and in the "DO'S AND DON'TS" box. "TAPEWRITER", again with

the registration symbol ®, is used alone on the back of Exhibit E (R. 15), and is either given the same prominence as is shown by the back page of the exhibit or *greater* prominence as is shown by the front page.

In the face of this record evidence, it is manifestly clear that appellee's statements that appellant is using the registration symbol after "DYMO" and not after "TAPEWRITER" and that "DYMO" is appellant's primary trademark and not "TAPEWRITER" are dehors the record.

Appellee cites *Kellogg Co. v. Nat. Biscuit Co.* (1938), 305 U. S. 111 (Brief for Appellee, page 27). There, in deciding that the defendant did not infringe plaintiff's mark, the court pointed out that the defendant did not use the registered trademark by itself, but only used the mark in conjunction with its own very well-known trademark "Kellogg". The facts of the *Kellogg* case, however, are very different from the facts of the case at bar. In the case at bar, the trade name of appellee is itself confusingly similar to appellant's mark. Its inclusion on the package serves to compound the confusion, not to minimize it. That case actually turned upon the well established right of the public to use the designation "shredded wheat" on a patented product after the expiration of the patent. The court held that there could be no secondary meaning because the popularity of the designation arose as a consequence of the patent monopoly. Here the trademark "TAPEWRITER" was not even adopted until after the expiration of the

basic Zipf and Payne embossing machine patents set forth in paragraph 6 of the opposition affidavit of Daniel T. Anderson (R. 33).

But in any event the law is clear that a trademark proprietor may use several marks in connection with the sale of his merchandise and that each of the marks is protectable [*General Shoe Corporation v. Rosen* (4 Cir. 1940), 111 F. 2d 95]. There the court said at page 99:

“Our conclusion is that the term ‘Friendly’ as applied to shoes, is a valid trade mark entitling the owner to the protection of the court; and it is not invalidated by the fact that in many instances, perhaps the majority, it has been used by the plaintiff on its goods and in its advertising matter in connection with its trade mark ‘Jarman’. More than one trade mark may be used by the owner upon his wares without invalidating either. * * *”

And in *Fleischmann Distilling Corp. v. Maier Brewing Company* (9 Cir. 1963), 314 F. 2d 149, this Court had a similar contention before it. There, at page 161, the Court said:

“We notice one conclusion of the district court (No. 13), which can have no bearing upon the decision of this case. That conclusion reads as follows: ‘13. The defendants, by using the name “Black & White” on beer, have not infringed the plaintiffs’ trademark rights in plaintiffs’ combination mark of the words “Black & White” and two Scottie dogs.’ The facts are that Buchanan has two federal trademarks;—one is the Black & White mark which we have previously discussed,

and the other, which it registered at a later date, consisted of the combination of the words 'Black & White' and a picture of a pair of Scottie dogs, one of them black and one of them white. The evidence shows that Buchanan had used both trade-marks on this whisky. The first one, 'Black & White' appears on the label on the front of the bottle; the combination trademark,—the Scottie dogs combined with the words Black & White,—appear on the label on the back of the bottle. This action was brought for infringement of the first trademark using the words Black & White alone. It is not alleged that the other trademark was infringed by the defendants and the fact that the Scottie dogs do not appear on defendants' beer is immaterial and irrelevant. Conclusion No. 13 is also irrelevant."

G

Appellee contends that appellant has unclean hands because of alleged misuse of the symbol ® in connection with the trademark "DYMO" (Brief for Appellee, pp. 9, 29-31). At the outset, appellant urges that its use of the trademark "DYMO" is immaterial in the issues at bar. Relief is here sought, not for infringement of that mark, but for infringement of the trademark "TAPEWRITER". There is not even a pretense that there has been any misuse of the trademark symbol with regard to the mark in suit.

However, even if the issue were germane, there are no false representations in the case at bar. Here appellant did in fact own a registration on the mark "DYMO" (R. 142). On various advertisements, ap-

pellant did sometimes place the symbol ® after the trademark “DYMO” even when the advertisement in which the symbol was used was directed to embossing machines. The mere fact that the registration certificate itself specifies a line of goods which does not recite embossing machines does not rob the mark of its registered status. Here the advertisement is true, not false. The notice designation is a truthful statement of the fact of registration which gives notice to the public that the mark is registered. It protects the public from inadvertent use of the mark even though from a hypertechnical standpoint, the registration certificate does not recite the specific goods in question. There is no suggestion in the record that the symbol was used with the intent to deceive any member of the public.

The three cases which appellee cites on the proposition do not even touch upon the question here at bar. Their generalized statements refer to statements which are false and which were knowingly made. In the case at bar on the other hand, the symbol ® is permitted by statute to designate a registered trademark (U. S. Code, Title 15, § 1111). Nothing in the statute limits the right to give statutory notice because of the classification of goods recited in the certificate. Appellee actually asks this Court to write a limitation into the statute which the Congress did not see fit to impose.

Appellant submits that the unclean hands defense should be stricken. The District Court gave it no weight. Appellee should not resurrect it here.

H

Appellee's Point XA that appellant is not entitled to a preliminary injunction because it has not shown irreparable injury (Brief for Appellee, pages 59-62) is without substance. Appellee has a capitalization of only \$25,000 (Plaintiff-Appellant's Opening Brief, page 5). If it is permitted to continue to use the mark "TAPEPRINTER" in competition with "TAPEWRITER", appellee may completely destroy the mark itself and destroy the good will which appellant has given the mark. With a capitalization of \$25,000 and an accumulated indebtedness of \$350,000, appellee can not respond in damages if appellant is successful. On the other hand, the bond required for a preliminary injunction will protect appellee in the event the injunction should later prove to be improper for any reason. The amount of damages to appellee are bound to be small. The substitution of a non-confusing trademark for the mark "TAPE-PRINTER" contemplates nothing more than the printing of new literature and packaging, the correction of a die, and the adoption of a new corporate name and trademark. If there ever was a case where the equities cry out for the issuance of a preliminary injunction, this is that case.

I

Appellee's Point XB is that appellant is not entitled to a preliminary injunction because of laches, acquiescence and estoppel (Brief for Appellee, page 63). Appellee points to no facts creating laches and

estoppel. The undisputed facts in this case are that appellee is a new-comer in this business and that suit was filed promptly after the appellee placed its product upon the market (Affidavit of Leo B. Helzel, R. 23-24, also Affidavit of Benedict Bogeaus, p. 3, R. 78). Moreover, even if laches were present that would not bar injunctive relief [*Safeway Stores v. Dunnell* (9 Cir. 1949), 172 F. 2d 649].

J

Appellee's final Point XI is to the effect that appellant has not sustained its burden of proof because its authorities are distinguishable (Brief for Appellee, pages 64 and 65). Although appellant cited only 11 cases, appellee responds only to *Fleischmann Distilling Corp. v. Maier Brewing Company* (9 Cir. 1963), 314 F. 2d 149, which is cited at page 16 of the opening brief and *National Lead Company v. Wolfe* (9 Cir. 1955), 223 F. 2d 195 which is cited at pages 6 and 11 of the opening brief.

We have argued above that appellee's distinctions of the *Fleischmann* and *National Lead* are unsound (this brief, page 6).

In discussing *Fleischmann* and *National Lead*, appellee also finds it significant that this Court subsequently held for defendant in *Plough, Inc. v. Kreis Laboratories* (9 Cir. 1963), 314 F. 2d 635 (Brief for Appellee, page 64, see also pages 31 and 35). There is no parallel between *Plough* and the case at bar. In *Plough*, plaintiff used the trademark "Coppertone" and defendant used the trademarks "Coca Tan" and

“Coca Tint”. The opposing marks are dissimilar both in sound and in connotation. Clearly no confusion could arise in the market place. The dispute arose, not in the market place, but out of an earlier adjudication in which, by consent, the defendant was prohibited from using a series of marks including the syllable “copa” which is, of course, similar in sound and connotation to “copper”. The *Plough* case is a split decision which appellee should not seek to expand beyond the facts there adjudicated.

K

Appellee’s survey presented under Point IX of its brief (Brief for Appellee, pp. 51-58) has no relevancy to this case. Only the marks in question are given in every instance. In many cases, such an important fact as the goods involved is not even recorded (Brief for Appellee, pp. 55-58). Manifestly many other important facts bearing on the outcome of each case, such as the channels of trade, the intent of the defendant in adopting the mark, etc., are also omitted. Under these circumstances such a list is of no help to the Court in passing on the issue here. As this Court recently observed in the *Fleischmann Distilling Corp. v. Maier Brewing Company* (9 Cir. 1963), 314 F. 2d 149 at page 160:

“* * * It is elementary that in the decision of a case of this kind, involving the question of confusing similarity, each case must stand on its own facts, and prior decisions are of little assistance.
* * *” (Footnote omitted).

For the reasons stated appellant urges that the order of the District Court be reversed and that it have the relief prayed for in the conclusion of the opening brief, page 18.

Dated, San Francisco, California,
August 28, 1963.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CARL HOPPE,

One of the Attorneys for Plaintiff-Appellant.

